

## Foster, Denise

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**From:** Karl Tegland [karltegland@live.com]  
**Sent:** Tuesday, January 29, 2013 3:56 PM  
**To:** Foster, Denise  
**Subject:** Proposed Amendment to ER 901

Regarding the proposed amendment to ER 901, I tend to agree with the comment from Andrew Hay. To require require authenticating testimony from both the sender and the receiver just to authenticate an e-mail seems rather burdensome.

In most jurisdictions that have addressed the issue, the courts have said that authenticating testimony from the receiver is sufficient, particularly if the receiver can point to other distinctive characteristics in the e-mail to connect it the the sender. Examples might include language used by the sender, or the sender's telephone number listed in the e-mail, or the fact that the sender is responding to a question posed earlier by the receiver.

A leading case on this point is *State v. Thompson*, 777 N.W.2d 617 (ND 2010) (firmly rejecting the notion that e-mails should be subject to authentication requirements more rigorous than those imposed upon traditional written communications; the possibility of alteration or forgery goes to weight, not admissibility).

One possible solution would involve the judicious use of the word "purports." The purpose of adding the word would be to make it clear that SOMEBODY should testify about the identity and address of the sender, but that the testimony can come from the RECEIVER, and need not come from the sender.

The amendment would then read like this:

(10) *Electronic Mail (E-mail)*. Testimony by a person with knowledge that (i) the e-mail PURPORTS TO BE authored or created by a particular sender or the sender's agent; (ii) the e-mail PURPORTS TO BE sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

I am sure other approaches to re-drafting could also accomplish the desired result. I urge the Supreme Court to refer this proposed amendment back to the WSBA for further discussion.

Thank you for considering my thoughts.

Karl Tegland

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